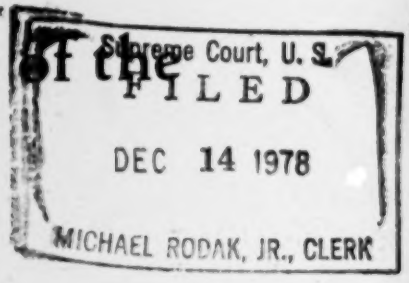
In the Supreme Court of the United States

OCTOBER TERM 1978
No. 78-334



KENNETH F. FARE,
Acting Chief Probation Officer,

Petitioner,

v.

MICHAEL C.,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF FOR THE PETITIONER

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The majority, concurring and dissenting opinions of the California Supreme Court, copies of which are set forth as Appendix A to the Petition for Writ of Certiorari, are reported as *In re Michael C.* (1978) 21 Cal.3d 471, 146 Cal. Rptr. 358, 579 P.2d 7. The opinion of the California Court of Appeal for the Second Appellate District, Division Three, reported and then vacated, which affirmed the order of wardship, appears as Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

The jurisdiction of this Court is invoked under Title 28, United States Code, section 1257(3) to review a judgment of the California Supreme Court which was entered on May 30, 1978, and became final on June 29, 1978. This judgment was a final decision rendered by the highest court of the State of California interpreting rights under the United States Constitution. The Petition for Writ of Certiorari was filed on August 28, 1978, and was granted on October 30, 1978.

QUESTIONS PRESENTED

When a juvenile requests the presence of his probation officer during the course of a custodial interrogation, does the Fifth Amendment as interpreted in *Miranda v. Arizona* (1966) 384 U.S. 436, require the cessation of all further interrogation and the suppression of evidence of statements obtained following denial of the request?

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution Amendment V:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

United States Constitution, Amendment VI:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

United States Constitution, Amendment XIV, in relevant part:

> "SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws. . . ."

STATUTES INVOLVED

18 United States Code, Section 3501

> "(a) In any criminal prosecution brought by the United States or by the District of Columbia, a confession, as defined in subsection (e) hereof, shall be admissible in evidence if it is voluntarily given. Before such confession is received in evidence, the trial judge shall, out of the presence

of the jury, determine any issue as to voluntariness. If the trial judge determines that the confession was voluntarily made it shall be admitted in evidence and the trial judge shall permit the jury to hear relevant evidence on the issue of voluntariness and shall instruct the jury to give such weight to the confession as the jury feels it deserves under all the circumstances."

"(b) The trial judge in determining the issue of voluntariness shall take into consideration all the circumstances surrounding the giving of the confession, including (1) the time elapsing between arrest and arraignment of the defendant making the confession, if it was made after arrest and before arraignment, (2) whether such defendant knew the nature of the offense with which he was charged or of which he was suspected at the time of making the confession, (3) whether or not such defendant was advised or knew that he was not required to make any statement and that any such statement could be used against him, (4) whether or not such defendant had been advised prior to questioning of his right to the assistance of counsel; and (5) whether or not such defendant was without the assistance of counsel when questioned and when giving such confession."

"The presence or absence of any of the above-mentioned factors to be taken into consideration by the judge need not be conclusive on the issue of voluntariness of the confession."

"(c) In any criminal prosecution by the United States or by the District of Columbia, a confession made or given by a person who is a

defendant therein, while such person was under arrest or other detention in the custody of any law-enforcement officer or law-enforcement agency, shall not be inadmissible solely because of delay in bringing such person before a magistrate or other officer empowered to commit persons charged with offenses against the laws of the United States or of the District of Columbia if such confession is found by the trial judge to have been made voluntarily and if the weight to be given the confession is left to the jury and if such confession was made or given by such person within six hours immediately following his arrest or other detention: *Provided*, That the time limitation contained in this subsection shall not apply in any case in which the delay in bringing such person before such magistrate or other officer beyond such six-hour period is found by the trial judge to be reasonable considering the means of transportation and the distance to be traveled to the nearest available such magistrate or other officer."

"(d) Nothing contained in this section shall bar the admission in evidence of any confession made or given voluntarily by any person to any other person without interrogation by anyone, or at any time at which the person who made or gave such confession was not under arrest or other detention."

"(e) As used in this section, the term 'confession' means any confession of guilt of any criminal offense or any self-incriminating statement made or given orally or in writing."

California Penal Code, Section 187, in relevant part:

"(a) Murder is the unlawful killing of a human being, or fetus, with malice aforethought. . . ."

California Penal Code, Section 830.5, in relevant part:

"(a) Any parole officer of the State Department of Corrections, placement or parole officer of the Youth Authority, probation officer, or deputy probation officer is a peace officer. Except as otherwise provided in this subdivision, the authority of any such peace officer shall extend only (1) to conditions of parole or of probation by any person in this state on parole or probation; (2) to the escape of any inmate or ward from a state institution; (3) to the transportation of such persons; and (4) as provided in Section 8597 or 8598 of the Government Code, or when acting pursuant to Section 8617 of the Government Code. The authority of any parole officer of the State Department of Corrections shall further extend to violations of any penal provisions of law which are discovered in the course of and arise in connection with his employment. . . ."

California Welfare and Institutions Code, Section 602:

"Any person who is under the age of 18 years when he violates any law of this state or of the United States or any ordinance of any city or county of this state defining crime other than an ordinance establishing a curfew based solely on age, is within the jurisdiction of the juvenile court, which may adjudge such person to be a ward of the court."

California Welfare and Institutions Code, Section 650:

"(a) A proceeding in the juvenile court to declare a minor a dependent child of the court or

a ward of the court under Section 601 is commenced by the filing with the court, by the probation officer, of a petition, in conformity with the requirements of this article.

"(b) A proceeding in the juvenile court to declare a minor a ward under Section 602 of the court is commenced by the filing with the court, by the prosecuting attorney as petitioner, of a petition, in conformity with the requirements of this article."

Former California Welfare and Institutions Code Section 650 (in effect when the instant proceedings commenced in the trial court):

"A proceeding in the juvenile court to declare a minor a ward or a dependent child of the court is commenced by the filing with the court, by the probation officer, of a petition, in conformity with the requirements of this article."

(Cal. Stats. 1961, ch. 1616, § 2, p. 3477.)

STATEMENT OF THE CASE

A. Statement of the Proceedings

Respondent is a minor who was committed to the California Youth Authority as a ward of the Superior Court of the State of California for the County of Los Angeles on May 10, 1976, following the juvenile court's finding under California Welfare and Institutions Code section 602 that respondent had committed murder in violation of California Penal Code section 187. (A, pp. 4-10.) [1]

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[1] "A" refers to the Appendix prepared following the granting of the writ of certiorari and filed under separate cover.

On January 24, 1977, the Court of Appeal of the State of California, Second Appellate District, Division Three, affirmed the judgment in a unanimous opinion. (Pet. For Cert. App. B.)

Respondent's application to the California Supreme Court for a hearing was granted, and on May 30, 1978, that court in a divided opinion reversed the judgment on the ground that the interrogation of respondent following the denial of his request to see his probation officer constituted a violation per se of the requirements laid down in *Miranda v. Arizona* (1966) 384 U.S. 436. (Petn. for Cert., App. A.)

Petitioner's application for stay of issuance of the remittitur and for an order deferring the execution and enforcement of the judgment was denied by the California Supreme Court on June 29, 1978. Three of the seven justices of the court were of the opinion that the application should have been granted. On July 28, 1978, Mr. Justice Rehnquist ordered enforcement of the judgment of the California Supreme Court stayed pending timely filing and disposition by this Court of a petition for a writ of certiorari, and further ordered that upon the granting of the petition, the stay would remain in effect until this Court decided the case or otherwise ordered. The petition for writ of certiorari was filed on August 28, 1978, and granted on October 30, 1978.

B. Statement of Facts Adduced at the Juvenile Court Adjudication Hearing

On January 19, 1976, at approximately 9:30 p.m., Helen Yeager arrived at her home located at 8939 Paloma Avenue in Los Angeles County, State of California. She was accompanied by her husband. Mrs. Yeager then left the house for about seven minutes to look for the family

dog. As she left, she observed respondent standing across the street from her house. When she returned, she found a trail of blood leading to her husband's dead body which lay in a pool of blood inside the house. (RT pp. 90-92.)[2] Mr. Yeager had been killed by a gunshot wound to the neck. (RT pp. 112-113.)

John Dennis Sheehan, a neighbor of the Yeagers', saw a vehicle with three occupants arrive at the Yeager house at approximately 9:30 p.m. on January 19, 1976. (RT pp. 243-248.) Mr. Sheehan then observed Mrs. Yeager leave, and subsequently he heard a loud noise (like a bang) coming from the Yeager house. (RT pp. 279-282.)

On February 4, 1976, respondent had a conversation with a Los Angeles police officer at a police station in Van Nuys, California. After advising respondent of his constitutional rights, the interrogating officer continued the conversation as follows:

> Q. . . . Do you understand all of these rights as I have explained them to you?
>
> A. Yeah.
>
> Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?
>
> A. What murder? I don't know about no murder.
>
> Q. I'll explain to you which one it is if you want to talk to us about it.
>
> A. Yeah, I might talk to you.
>
> Q. Do you want to give up your right to have an attorney present here while we talk about it?
>
> A. Can I have my probation officer here?
>
> Q. Well I can't get a hold of your probation

---

[2] "RT" refers to the "Reporter's Transcript" of the trial court proceedings which was included as part of the record before the California Supreme Court.

officer right now. You have the right to an attorney.

A. How I know you guys won't pull no police officer in and tell me he's an attorney?

Q. Huh?

A. [Repeat of last answer.]

Q. Your probation officer is Mr. Christiansen.

A. Yeah.

Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. That's your right. You understand that right?

A. Yeah.

Q. Okay, will you talk to us without an attorney present?

A. Yeah I want to talk to you.

(A, pp. 54-55; *see also In re Michael C.* (1978) 21 Cal.3d 471, 473-474, 146 Cal. Rptr. 358, 579 P.2d 7.)

Later during the interrogation, respondent confessed to the offense. (A, pp. 65-81; *In re Michael C., supra,* at p. 474.)

Charles P. Christiansen, respondent's probation officer from a previous offense, stated that he had counseled respondent as to family problems and had told respondent to contact him whenever resondent had contact with the police (A, p. 27.) He never told respondent that he was not supposed to talk to the police. He told respondent that he should not admit openly to an offense without some advice from his parents or a lawyer. (A, pp. 29-30.)

No affirmative defense was presented at the hearing on the factual basis for the petition filed under California Welfare and Institutions Code section 602. (RT p. 409.)

SUMMARY OF ARGUMENT

I.

A criminal suspect does not invoke his right to silence under *Miranda v. Arizona* unless he remains silent or otherwise expresses his intent not to speak. Because of the severe consequences on law enforcement of an inflexible rule such as that imposed by *Miranda,* police officers must be afforded an opportunity to ascertain whether an ambiguous response to a *Miranda* advisement constitutes an expression of a suspect's desire not to speak. Respondent-minor's request to see his probation officer in the instant case was an ambiguous statement which failed to express a clear desire not to speak. Since further inquiries by the police revealed the minor's willingness to speak, respondent's subsequent confession was therefore not vitiated by any invocation of his right to remain silent.

Where a suspect has not clearly expressed a desire to remain silent, his confession is admissible if: (a) he is sufficiently informed of his right to counsel and against self-incrimination to permit him to make a knowing and intelligent decision to speak or to remain silent; and (b) the circumstances attending his interrogation are free of coercion which would override his free will. Respondent-minor was fully advised of his rights under *Miranda* and was able knowingly and intelligently to waive them. The totality of circumstances attending the interrogation indicate the absence of coercion. Respondent's confession was therefore admissible as a voluntary statement.

II.

The Fifth Amendment does not require that minors be afforded the presence of a non-attorney adult advisor during custodial interrogation. The denial of a request for such an advisor is but one factor to be considered in determining the voluntariness of a minor's confession. Because respondent-minor knowingly and intelligently waived his *Miranda* rights under circumstances which indicated a lack of compulsion, the denial of his request for a probation officer did not vitiate his confession.

ARGUMENT

In *Miranda v. Arizona,* (1966) 384 U.S. 436, this Court established the procedural requirement that the custodial interrogation of a suspect by a police officer be preceeded by advisement and waiver of the right against self-incrimination including the right to have counsel at the interrogation. Violation of the procedural requirements set down in *Miranda* have a harsh result on law enforcement in that even the most heinous of crimes may go unprosecuted if a confession, which is in fact voluntary, is rendered inadmissible into evidence because of a technical *Miranda* defect.

A major criticism of *Miranda* was that it would measurably weaken the ability of the criminal justice system to perform the task of protecting the community through the apprehension and prosecution of those who violate the law. (*See Miranda v. Arizona supra,* at pp. 539-543 (White, J., dissenting).) Yet this was clearly not the intent of the *Miranda* court which noted:

> "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence." (*Miranda v. Arizona supra,* at p. 478.)

Due to the potentially serious consequences of the *Miranda* exclusionary rule, countered by the recognized importance of confessions in law enforement, petitioner submits that evidence should not be excluded on techincal *Miranda* grounds in the absence of a clear showing of a *Miranda* violation.

I.

A CRIMINAL SUSPECT DOES NOT EXERCISE HIS RIGHT TO SILENCE UNDER *MIRANDA V. ARIZONA* UNLESS HE STANDS MUTE OR OTHERWISE CLEARLY EXPRESSES HIS DESIRE NOT TO SPEAK

In the present case the California Supreme Court determined respondent's confession to have been obtained in violation of *Miranda v. Arizona, supra,* solely because it held that the police had continued an interrogation after respondent had requested to see his probation officer. The basis for the holding was the court's conclusion that the request for a probation officer constituted conduct which "reasonably appears inconsistent with a present willingness on the part of the suspect to discuss his case freely and completely with police *at that time" (People v. Randall* (1970) 1 Cal.3d 948, 956 [83 Cal. Rptr. 658, 464 P.2d 114]) and that such a request constituted an invocation of the privilege against self-incrimination. (*In re Michael C.* (1978) 21 Cal.3d 471, 476-478 [146 Cal. Rptr. 358, 579 P.2d 7]; Petn. for Cert., App. A, pp. 23, 25.)

Petitioner submits the holding should be overturned because: (a) the court incorrectly determined that a request for a probation officer was analogous to a request for counsel; and (b) the court followed an erroneous test in assessing the significance of respondent's request for his probation officer.

A. A Suspect's Request for His Probation Officer Does Not Constitute An Invocation of the Right to Silence

In the case at bar, the California Supreme Court held that respondent's request for his probation officer was as much an invocation of his Fifth Amendment privilege as a request for an attorney. (*In re Michael C. supra,* at 477; Petn. for Cert., App. A, p. 25.) The court below would find that such a request from a minor always invokes the right to silence. Petitioner submits that it is unreasonable to place a probation officer in such a role.

This Court, in defining the specific advisements and waivers that are required to be taken prior to the commencement of custodial interrogation, has included the right to consult with counsel prior to questioning and also the right to have counsel present during questioning. (*Miranda v. Arizona, supra,* at pp. 469-470.) While the *Miranda* requirement of a right to counsel has been characterized as a Fifth Amendment right, clearly counsel was singled out by the *Miranda* majority because of the importance of an attorney's role as defined under the Sixth Amendment.[3] This Court noted the important and unique

[3]The *Miranda* court viewed the right to the presence of counsel during custodial interrogation as insurance against an unknowledgeable and unintelligent waiver of Fifth Amendment rights and as a shield against coercion. This Fifth Amendment right to counsel was partly an extension of *Escobedo v. Illinois* (1964) 378 U.S. 478, where the Court held that the Sixth Amendment guaranteed a suspect the right to counsel after he is in custody and a process of interrogation tending to elicit incriminating evidence has begun. (*See* Graham, *What Is "Custodial Interrogation?": California's Anticipatory Application of Miranda v. Arizona* (1966)14 **UCLA L. REV.** 59, 72; Comment *The New Difinition: A Fifth Amendment Right To Counsel* (1967) 14 **UCLA L. REV.** 604, 607, 623.) Prior to *Escobedo,* neither the Fifth nor Sixth Amendments was expressly used as authority in state confession cases. Rather, this Court relied on a test of "voluntariness"

protections provided by the presence of counsel during custodial interrogation. (*Id.,* at p. 469.)

This judicial merger of Sixth Amendment protections into the penumbra of the Fifth Amendment was perhaps best summarized by the dissenters in *Miranda* who viewed the philosophical basis of the decision with the detachment of literary critics. Mr. Justice Harlan noted that the Sixth Amendment's judicial precedents are the "linchpins" of the *Miranda* confession rules. (*Id.,* at p. 513 (Harlan, J., dissenting).) Mr. Justice White observed:

> ". . . . By considering any answers to any interrogation to be compelled regardless of the content and course of examination and by escalating the requirements to prove waiver, the Court not only prevents the use of compelled confessions but for all practical purposes forbids interrogation except in the presence of counsel. That is, instead of confining itself to protection of the right against compelled self-incrimination *the Court has created a limited Fifth Amendment right to counsel — or, as the Court expresses it, a 'need for counsel to protect the Fifth Amendment privilege . . . .'* The focus then is not on the will of the accused but on the will of counsel and how much influence he can have on the accused. Obviously there is no warrant in the Fifth Amendment for this installing counsel as the arbiter of the privilege." (*Id.,* at pp. 536-537 (White, J., dissenting) (Emphasis added).)

which included some reference to Fifth Amendment privileges, but allowed courts the flexibility to review the totality of the circumstances surrounding each confession. (*See,* e.g., *Haynes v. Washington* (1963) 373 U.S. 503; *Culombe v. Connecticut* (1961) 367 U.S. 568; *Rogers v. Richmond* (1961) 365 U.S. 534.)

If, as Mr. Justice White would have held, the Fifth Amendment did not warrant a rule installing counsel as the arbiter of the privilege, *a fortiorari,* it would not warrant installing a probation officer, a relative, or any other non-attorney advisor as the arbiter of the privilege. However, even under the *Miranda* majority's holding that counsel is essential to protect Fifth Amendment rights, it is clear that the reference is to *legal* counsel who possesses the training and nearly absolute duty to protect his client. *Miranda* does not call for the creation of a class of surrogate attorneys consisting of any persons the suspect may consider to be an advisor.

The California Supreme Court erroneously held that respondent-minor's relationship with his probation officer was similar to that between a defendant and counsel. Below, the court held:

> "In view of the emphasis which the juvenile court system places upon the close relationship between a minor and his probation officer, and in light of the probation officer's instructions in the present case that his ward contact him immediately in case of trouble, the 'normal reaction' of the minor here would be to request consultation with his probation officer. Fearing that the police would take advantage of his ignorance, Michael wanted and needed the advice of someone whom he knew and trusted. He therefore asked for his probation officer — a personal advisor who would understand his problems and needs and on whose advice the minor could rely." (Footnotes omitted) (*In re Michael C., supra* at p. 476; Petn. for Cert., App. A, p. 23.)

Quite apart from the fact that the record in this case does not establish respondent's fear of the police, ignorance of the law or trust in his probation officer, it is submitted that

the particular factual findings of the court in the present case do not support the establishment of a per se rule that a minor's request for his probation officer constitutes an invocation of his *Miranda* rights.

The probation officer requested by Michael C. was a peace officer. In California, probation officers act as an arm of the prosecutorial system and cannot be advocates or act as legal counsel during interrogation. (*See* Cal. Pen. Code § 830.5; Cal. Welf. & Inst. Code § 283.) In fact, it was the Acting Probation Officer of Los Angeles County who, pursuant to his statutory responsibility, initiated the instant proceedings and brought the instant charges relating to respondent in the trial court. (A, pp. 4-5.) If respondent's probation officer had been present during interrogation he would have been there as a law enforcement officer. (*See In re Steven C.* (1970) 9 Cal. App.3d 255, 263-266 [88 Cal. Rptr. 97].) If respondent had made a confession to his probation officer, the officer would have been required to give respondent the *Miranda* admonitions. (*Cf. In re Paul T.* (1971) 15 Cal. App.3d 886, 893 [93 Cal. Rptr. 510].) While an attorney could counsel a suspect to remain silent, "the probation officer must counsel his charge to be cooperative [with the police] and to help solve the crime, even if by doing so the minor implicates himself in a serious felony." (*In re Michael C., supra,* at p. 479; Petn. for Cert., App. A, pp. 27-28 (Mosk, J., concurring).) Respondent was fully aware of the fact that his probation officer was a peace officer and thus could not act as legal counsel. (A, p. 29.)

California is by no means unique in conferring peace officer status on juvenile probation officers. Petitioner submits that no jurisdiction grants attorney status to probation officers. Twenty jurisdictions designate probation officers as having the authority of a law enforcement

officer.[4] Four jurisdictions state that probation officers do not have the authority of law enforcement officers, but nevertheless do provide them with some degree of power to take juveniles into custody.[5] Seventeen jurisdictions provide probation officers with the authority to arrest with or without a warrant.[6] Eight jurisdictions provide proba-

[4] Arizona: Ariz. Rev. Stat. § 8-205; California: Cal. Penal Code § 830.5 (West); Colorado: Colo. Rev. Stat. § 19-5-102; Connecticut: Conn. Gen. Stat. Ann. § 17-58 (West); Delaware: Del. Code tit. 11, § 4321; District of Columbia; D.C. Code Encycl. § 11-1524 (West); Hawaii: Haw. Rev. Stat. § 571-85; Idaho: Idaho Code § 16-1820; Iowa: Iowa Code Ann. § 231.10 (West); Kentucky: Ky. Rev. Stat. § 208.320; Massachusetts: Mass. Gen. Laws Ann. ch. 276 § 90; Minnesota: Minn. Stat. Ann § 260.311; Missouri: Mo. Ann. Stat. § 211.401 (Vernon); Nevada: Nev. Rev. Stat. §§ 62.120 and 62.122; New York: N.Y. Exec. Law § 257 (McKinney); N.Y. Crim. Proc. Law § 1.20; North Carolina: N.C. Gen. Stat. § 110-23; Oregon: Or. Rev. Stat. § 419.610; South Carolina: S.C. Code § 15-1377; South Dakota: S.D. Compiled Laws Ann. § 26-7-9; Texas: Texas Ann. Civ. Stat. art. 5142 (Vernon).

[5] Indiana: Ind. Code Ann. §§ 31-5-7-12 and 33-12-2-22 (Burns); New Mexico: N.M. Stat. Ann. § 13-14-8; North Dakota: N.D. Cent. Code § 27-20-06; Tennessee: Tenn. Code Ann. § 37-206.

[6] Alaska: Alaska Stat. § 47.10.20; Illinois: Ill. Ann. Stat. ch. 38 § 204-3 (Smith-Hurd); Louisiana: La. Rev. Stat. Ann. § 13:1587 (West); Maine: Me. Rev. Stat. tit. 34 § 1682; Nebraska: Neb. Rev. Stat. § 29-2216; and Neb. Rev. Stat. §§ 29-2258 and 29-2266; New Hampshire: N.H. Rev. Stat. Ann. § 504:4; New Jersey: N.J. Stat. Ann. § 2A: 168-4 (West); Ohio: Ohio Rev. Code Ann. § 2151.14 (Page); Oklahoma: Okla. Stat. Ann. tit. 10 § 1205 (West); Rhode Island: R.I. Gen. Laws § 14-1-33; United States: U.S.C.A. tit. 18 § 3653 (West); Utah: Utah Code Ann. § 78-3a-29; Vermont: Vt. Stat. Ann. tit. 28 § 301; Virginia: Va. Code § 16.1-237; Washington: Wash. Rev. Code Ann. § 13.04.040; Wisconsin: Wis. Stat. Ann. § 54.15 (West); Wyoming: Wyo. Stat. § 7-31.

tion officers with limited authority to take a juvenile into custody.[7] Two jurisdictions do not provide the probation officers with either the authority to arrest or take a juvenile into custody unless requested to do so by the court.[8] Only one jurisdiction specifically states that juvenile probation officers do not have the authority of a law enforcement official and yet does not provide probation officers with the authority to take a minor into custody.[9] Thus, to hold that a request for a probation officer's presence is per se both the equivalent of a request for counsel and an invocation of the right to be silent constitutes an absurd extension of the *Miranda* doctrine.

From the foregoing it may be concluded at the very least that the subjective intent of a suspect who requests to see his probation officer cannot be predicted with sufficient certainty to justify the per se rule which the California Supreme Court has established. Petitioner submits, moreover, that inquiries into whether a suspect wishes to speak with his probation officer, parent, coach or clergyman do not reach the fundamental point of *Miranda* which is that interrogation should not be undertaken by the police unless the suspect is informed of his rights and indicates a willingness to speak.

[7] Alabama: Ala. Code § 12-15-7; Florida: Fla. Stat. Ann. § 39.03 (West); Georgia: Ga. Code Ann. § 24A-602: Kansas: Kan. Stat/ Ann. § 38- 814; Maryland: Md. Ann. Code, Cts. and Jud. Procd. § 3-814; Michigan: Mich. Stat. Ann. § 27.3178 (598.14); Montana: Mont. Rev. Codes Ann. § 10-1234; Pennsylvania: Pa. Stat. Ann. tit. 11 § 50-201.

[8] Arkansas: Ark. Stat. Ann. § 45-414; Mississippi: Miss. Code Ann. §§ 43-21-43 and 43-23-43.

[9] West Virginia: W. Va. Code §§ 49-5-8 and 49-5-15.

B. When Given an Ambiguous Response by a Suspect Following a *Miranda* Warning, a Police Officer Should Be Permitted to Make Further Inquiries to Ascertain Whether the Suspect Desires to Remain Silent.

The California Supreme Court found that respondent had invoked his privilege against self-incrimination when he asked for his probation officer because such a request reasonably appeared inconsistent with a present willingness to speak within the meaning of *People v. Randall, supra*, 1 Cal.3d 948, 956. Petitioner submits that because the officer was able, by further conversation with respondent, to determine that respondent did not in fact wish to remain silent, the "reasonable appearance" standard utilized by the court is artificial, confusing and inappropriate for review of *Miranda* cases. This is not to say that when faced with an ambiguous statement the police may trick or cajole a suspect into a waiver of his rights. Rather, petitioner's contention is simply that an interrogating officer faced with an ambiguous statement by a suspect should be permitted to ascertain, by answering the suspect's questions, explaining the suspect's rights or asking additional questions of the suspect, whether the suspect in fact desires to waive his rights. Such a procedure would be consistent with this Court's holding in *Miranda, supra*, at 467, that its ruling was not intended as the sole solution to the problem of compulsion in the interrogation process.

The facts of the present case classically illustrate petitioner's position. Shortly after respondent's arrest, Officer Stanley Miller advised him of his rights.

"BY OFFICER MILLER:

Q. Michael, I'm Investigator Miller, Van Nuys Homicide. This is Investigator Ridenour. Do you know why you're here?

BY MICHAEL CHRISTMAN:

A. No.

Q. I'll tell you why you're here. You're here for a murder investigation. Okay? Now do you understand why you're here?

A. Yeah.

A. [sic] I'm going to advise you of your constitutional rights. I'll advise you that you have the right to remain silent. If you give up the right to remain silent, anything you say can and will be used against you in a court of law. You have the right to speak to an attorney and to have the attorney present during questioning. If you so desire and cannot afford one, an attorney will be appointed for you without charge before questioning. Do you understand all of these rights as I have explained them to you?

A. Yeah." (A, pp. 54-55.)

After indicating he understood his rights and might talk, respondent asked if he could have his probation officer present.

"Q. Okay, do you wish to give up your right to remain silent and talk to us about this murder?

A. What murder? I don't know about no murder.

Q. I'll explain to you which one it is if you want to talk to us about it.

A. Yeah, I might talk to you.

Q. Do you want to give up your right to have an attorney present here while we talk about it?

A. Can I have my probation officer here?" (A, p. 55.)

Officer Miller indicated the probation officer was not available that evening but would probably be available later. He readvised respondent of his rights, and respondent indicated he wanted to talk.

"Q. Well I can't get a hold of your probation officer right now. You have the right to an attorney.

A. How I know you guys (Unintelligible) . . . won't call no police officer in and tell me he's an attorney?

Q. Huh?

A. [Repeat of last answer]

Q. Your probation officer (Unintelligible) is Mr. Christiansen?

A. Yeah.

Q. Well I'm not going to call Mr. Christiansen tonight. There's a good chance we can talk to him later, but I'm not going to call him right now. If you want to talk to us without an attorney present, you can. If you don't want to, you don't have to. But if you want to say something, you can, and if you don't want to say something you don't have to. That's your right. You understand that right?

A. Yeah.

Q. Okay, will you talk to us without an attorney present?

A. Yeah I want to talk to you." (A, p. 55.)

Assuming arguendo respondent's initial question regarding his probation officer might "reasonably appear inconsistent with a present willingness to speak" under *People v. Randall, supra,* a fact which petitioner does not concede, surely the subsequent conversation between respondent and Officer Miller indicated respondent was not stating a desire to remain silent.

Officer Miller's statement that he could not get hold of the probation officer immediately was by no means a coercive statement. The California Supreme Court did not criticize as improper his refusal immediately to provide respondent with his probation officer. Indeed, this Court in *Miranda, supra* at pp. 473-474, held that the police are not even required to provide counsel at a suspect's request. From the foregoing it is readily apparent that Officer Miller reacted properly to respondent's ambiguous request and that prior to interrogating respondent, Officer Miller received respondent's unequivocal waiver of his right to silence. Petitioner submits, therefore, that respondent did not invoke his right to silence by asking for his probation officer.

Petitioner submits that rulings such as the California Supreme Court's in the present case will require trial courts and police officers to speculate for each interrogation as to whether a request for a school coach, clergyman or any other person constituted an expression of the subject's subjective desire to remain silent. This Court should adopt the rule that an interrogating officer faced

with an ambiguous statement may make further inquiries to determine the suspect's desire, whether it be to speak or to remain silent. Under such a rule the admissability of statements would no longer be determined by the fact that a suspect did or did not utter certain "magic words," the significance of which may be understood by neither the suspect nor the interrogating officer.

The advantage of this simpler rule was cogently stated by Mr. Justice Rehnquist in his order staying the judgment of the California Court:

> "*Miranda v. Arizona* was decided by a closely divided Court in 1966. While the rigidity of the prophylactic rules was a principal weakness in the view of dissenters and critics outside the Court, its supporters saw that rigidity as the strength of the decision. It afforded police and courts clear guidance on the manner in which to conduct a custodial investigation: if it was rigid, it was also precise." (*Fare v. Michael C.* (1978) _____ U.S. _____, 99 S.Ct. 3, 5, (Rehnquist, J., sitting as Circuit Justice).)

Petitioner submits that a single rule permitting interrogating officers at the time of interrogation to obtain clarification of ambiguous statements and requiring cessation of interrogation only when a suspect indicates a desire not to speak will alleviate the need for speculation by the courts without jeopardizing Fifth Amendment rights.[10]

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[10]Since in the instant case respondent's request for his probation officer was not the equivalent of a request for counsel, this Court is not squarely presented with the question of whether a request for counsel constitutes the "magic words" which require immediate cessation of questioning. Petitioner submits, however, that even if respondent had asked if he could have an attorney, no prejudice to his Fifth Amendment rights would have occurred if the officer were permitted to ascertain whether respondent in fact did not wish to speak in the absence of counsel.

C. The Totality of Circumstances Indicates Respondent's Confession Was Voluntary

Petitioner submits that, in the absence of particular words or conduct constituting a per se invocation of the right to be silent, each case must be judged on the totality of the circumstances to determine if the statements in question were voluntary. To that end, the philosophy of the *Miranda* opinion and the requirements of the Fifth Amendment should mandate an affirmative answer to two questions: (1) Was there an absence of coercion sufficient to conclude that the suspect's free will was not overborne? and (2) Was the suspect sufficiently informed to make an intelligent and knowing choice between remaining silent and making a statement?[11]

The constitutional requirement is only that the suspect be not compelled to speak. (*United States v. Washington* (1977) 431 U.S. 181, 188.) That singular Fifth Amendment requirement is satisfied if the answer to the above two questions is "yes." It is satisfied by a process that examines the suspect's free will and intelligence, rather than focus solely on the form of the admonitions. Indeed, *Miranda's* addition to the law of interrogation, is not a requirement that police repeat a particular admonition, but rather that procedures be employed to assure that the custodial setting not be impermissibly coercive and that the suspect be permitted to make an informed choice on whether to invoke his right to be silent. In that respect, *Miranda* merely states what was implicit in several prior decisions. *Miranda* sets forth the constitutional minima:

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[11]In several cases, this Court has noted that *Miranda* warnings are simply a "prophylactic" and are not necessarily indispensable to the Fifth Amendment privilege against self-incrimination. (*See e.g., Brown v. Illinois* (1975) 422 U.S. 590, 600; *Michigan v. Payne* (1973) 412 U.S. 47, 53.) Thus, alternative methods which achieve

> " . . . [T]he prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination." (*Miranda v. Arizona, supra* at p. 444.)

Considering the first question, this Court acknowledged in *Miranda* that custodial interrogation creates some inherently coercive pressures. (*Id.,* at pp. 445-458.) However the very act of being asked a question by anyone in any setting places some amount of pressure on the subject. He is placed on the spot. He must make the decision whether or not to answer the question and if so, how to answer. The Fifth Amendment does not bar questioning, only the *compelling* of answers. Thus, where the suspect has not per se invoked his right to be silent, the fact finder answers the first question by examining the circumstances surrounding the interrogation. Such factors include the suspect's age, maturity, experience and intelligence, the length of custody as well as the nature of the interrogation. The dispositive question is whether the suspect's free will was overborne. (*See Rogers v. Richmond* (1961) 365 U.S. 534, 544.)

The second question is simply a determination of whether the suspect made an informed choice. Mr. Justice White, in his *Miranda* dissent noted that the central goal

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the underlying policies of the *Miranda* opinion are constitutionally acceptable. (*See Miranda v. Arizona, supra,* at p. 467.) Congress apparently effected a partial return to the pre-*Miranda* standard of voluntariness by enacting legislation to provide that failure to administer *Miranda* warnings is a factor to consider in determining the voluntariness of a statement, but is not dispositive on the question of the statement's admissibility. (18 U.S.C. § 3501.)

of the Fifth Amendment proscription is focused in terms of compulsion, not an whether specific warnings have been given.

> "That amendment deals with compelling the accused himself. It is his free will that is involved. Confessions and incriminating admissions, as such, are not forbidden evidence; only those which are compelled are banned. I doubt that the Court observes these distinctions today. . . ." (*Miranda v. Arizona supra,* at p. 536 (White, J., dissenting).)

In the case at bar there is no question *Miranda* admonitions were given and waivers secured. Petitioner submits that where, as here, the prophylactic rules of *Miranda* have been followed, the statements obtained cannot be per se inadmissible and the question of admissability then turns to whether, based on the totality of the circumstances, the statements were voluntary. Thus, petitioner's position is simply that in the absence of particular words or conduct that constitute a per se invocation of the right to be silent as defined in *Miranda v. Arizona supra,* the appropriate standard is "voluntariness," a standard that has long been the accepted rule. (*See Haynes v. Washington* (1963) 373 U.S. 503, 514; *Morales v. New York* (1969) 396 U.S. 102, 104.) If states are free to augment the list of per se invocations of Fifth Amendment privileges, then whatever virtue there is to the fact that *Miranda* establishes precise rules for law enforcement to follow will be lost. In the words of Mr. Justice Rehnquist, ". . . the decision of the California Supreme Court . . . risks cutting *Miranda* loose from its doctrinal moorings." *(Fare v. Michael C., supra,* ____ U.S. ____, 99 S.Ct. 3, 6 (Rehnquist, J., sitting as Circuit Justice).)

Nothing in the opinion of the California Supreme Court below suggests either that respondent was misinformed as to his rights or that any coercive circumstance rendered his confession involuntary. In fact, respondent's comments at the time of the interrogation demonstrate that he was well aware of his rights, and his waiver after multiple advisement of his rights by the interrogating officer was clear and unequivocal.

Petitioner submits that the Fifth Amendment and Fourteenth Amendment prohibition against a state's use of "compelled" statements does not justify the rigid standard set forth by the California Supreme Court. In the absence of a per se invocation of the right to be silent, the test of admissibility should be voluntariness based on the totality of the circumstances.

II.

A MINOR DOES NOT HAVE A FIFTH AMENDMENT RIGHT TO THE PRESENCE OF A NON-ATTORNEY ADULT ADVISOR DURING CUSTODIAL INTERROGATION

The opinions of the California Supreme Court in the case at bar and in the case of *People v. Burton* (1971) 6 Cal.3d 375 [99 Cal. Rptr. 1, 491 P.2d 793], should not be interpreted as fashioning a Fifth Amendment privilege for a minor to have a non-attorney adult advisor present

during custodial interrogation. In *Burton*, the court held that a minor's request for the presence of his parent was an invocation of *Miranda's* Fifth Amendment right to the presence of counsel. (*People v. Burton supra,* at p. 382.) In the instant case, the court below relied on *Burton's* interpretation of the Fifth Amendment to hold that a request for a probation officer invokes the right to be silent. (*In re Michael C. supra,* at pp. 475-476; Petn. for Cert. App. A, p. 22.) Although the California Supreme Court specifically declined to extend the holding to apply to requests for the presence of any adult advisor (e.g., football coach, music teacher or clergyman), the emerging rule appears to make surrogate attorneys out of any adult whose relationship to the minor is recognized in law. Thus, both parents and probation officers, who have legal responsibilities towards the minor, act as "counsel" during interrogation. (*In re Michael C. supra,* at p. 477; Petn. for Cert. App. A at p. 24.) Petitioner submits that nothing in *Miranda* or in the Fifth Amendment suggests that any adult advisor has the capacity to fulfill the important role that legal counsel performs during custodial interrogation. Thus, regardless of what relationship exists between the minor suspect and the adult requested, it is unreasonable to conclude that the request per se invokes Fifth Amendment privileges.

Several states have joined in holding that consultation with a responsible adult is a prerequisite to a minor's waiver of his Fifth Amendment rights. (*See*, e.g., *State in Interest of Dino* (La. 1978) 359 So.2d 586, 592-594; *Commonwealth v. Jamison* (Pa. 1977) 474 Pa. 541 [379 A.2d 87, 87-89]; *Lewis v. State* (Ind. 1972) 259 Ind. 431 [288 N.E.2d 138, 142]; *Freeman v. Wilcox* (Ga. 1969) 119 Ga. App. 325 [167 S.E.2d 163, 166-167].) A majority of jurisdictions allows a minor to waive his Fifth Amendment rights without the presence of an adult

advisor and treats the voluntariness of the waiver as a factual matter to be decided on the circumstances of each case. (*See State in Interest of Dino supra*, at p. 593, fn. 19, and discussion in *State v. Gullings* (Or. 1966) 244 Or. 173 [416 P.2d 311, 315].) Petitioner submits that the latter approach is the more reasonable.

A minor is not, as a matter of law, incapable of making a voluntary confession. (*See* discussion in *In re Gault* (1967) 387 U.S. 1, 44-56.) As the California Supreme Court noted prior to the line of cases challenged at bar:

> "[W]hether a minor knowingly and intelligently waived these [constitutional] rights is a question of fact; and a mere failure of the authorities to seek the additional consent of an adult cannot be held to outweigh, in any given instance, an evidentially supported finding that such a waiver was actually made." (*People v. Lara* (1967) 67 Cal.2d 365, 379 [62 Cal. Rptr. 586, 432 P.2d 202] *cert. denied*, (1968) 392 U.S. 945.)

In the pre-*Miranda* decision of *Gallegos v. Colorado* (1962) 370 U.S. 49, this Court applied the totality of the circumstances test of voluntariness to a confession by a fourteen-year-old minor who was held in custody for five days without being permitted to see a lawyer, a parent or other "friendly" adult, although his mother had attempted to see him. (*Id.*, at pp. 49-55.) Since the presence of a non-attorney so called "responsible adult" cannot provide the legal assistance during interrogation that was contemplated by the *Miranda* court, nothing in *Miranda* changed the totality of circumstances standard of voluntariness employed in *Gallegos*. In a given case, as in *Gallegos*, a request for an adult advisor might be evidence of the suspect's desire not to speak. However, the question is a

factual one in each case, and there is no justification for a per se rule. The youth of the suspect is but one factor in determining whether a waiver was maturely and intelligently made. (*See Haley v. Ohio* (1948) 332 U.S. 596, 599-600.) In a close case dealing with a youthful offender, failure to provide the presence of a parent or guardian may result in a finding that under the circumstances, the waiver was invalid. (*See In re Stiff* (Ill. 1975) 32 Ill. App.3d 971, 978 [336 N.E.2d 619, 625].) However, the constitution does not mandate the right to the presence of anyone other than a lawyer who is trained to protect the legal rights of a suspect during interrogation. Denial of a requested responsible adult is simply one factor in the totality of the case. (*See,* e.g., *Chaney v. Wainwright* (5th Cir. 1977) 561 F.2d 1129, 1131-1132; *People v. Riley* (Ill. 1977) 49 Ill. App.3d 304 [364 N.E.2d. 306], *cert. denied (1978) 98* S.Ct. 1657; *State v. Young* (Kan. 1976) 220 Kan. 541, 555 [552 P.2d 905, 916]; *Brajiel v. State* (Tenn. 1975) 529 S.W.2d 501, 505-506; *Mullin v. State* (Wyo. 1973) 505 P.2d 305, 309, *cert. denied* 414 U.S. 940; *State v. Hogan* (Minn. 1973) 297 Minn. 430 [212 N.W.2d 664, 670-671]; *State v. Hardy* (Ariz. 1971) 107 Ariz. 583 [491 P.2d 17, 17-18]; *State v. Oliver* (Conn. 1970) 160 Conn. 85 [273 A.2d 867, 871], *cert. denied* (1971) 402 U.S. 946; *People v. Pierre* (Ill. 1969) 114 Ill. App.2d 283 [252 N.E.2d 706, 710]; *Mosley v. State* (Ark. 1969) 438 S.W.2d 311, 312; *Stokley v. State of Maryland* (D. Md. 1969) 301 F. Supp. 653, 660.)

If a non-attorney adult advisor is present during the custodial interrogation of a minor, the minor's rights may not be better protected by such presence, since the adult advisor is not competent to give legal advice. In *Ezell v. State* (Okla. 1971) 489 P.2d 781, admission of a minor's statement was held to be error even though his mother was

present when the minor waived his *Miranda* rights. The court noted:

> "We are doubtful if the legal custodian [of the minor] or the mother made any difference as to whether he was afforded his constitutional rights in regard to the confession. It was never shown or was any attempt made to show either was knowledgeable in the law and therefore capable of protecting defendant's constitutional rights." (489 P.2d at p. 783.)

To confer a right to a non-attorney advisor's presence during interrogation would be to depart from the goals of *Miranda* which sought to ensure a suspect the right to someone trained in the law and with the ability to give sound professional advice. (*Miranda v. Arizona supra,* at pp. 480-481.) Petitioner submits that if a minor may knowingly and intelligently waive his rights under *Miranda*, then he is entitled to no special privileges beyond those set forth in *Miranda*. The absence of an adult advisor is merely one factor going to the question of voluntariness. That fact does not, per se, render a subsequent statement constitutionally invalid.

Petitioner submits that respondent did not per se invoke his Fifth Amendment privileges by asking for his probation officer and that neither *Miranda* nor the Fifth Amendment gives a minor a right to the presence of a non-attorney adult advisor during custodial interrogation.

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that the instant opinion and judgment of the California Supreme Court be reversed and that the judgment declaring respondent a ward of the Superior Court be affirmed.

Respectfully submitted,

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